(4)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA,
Petitioner,
vs.
NELLIE B. WIGGINTON,
Respondent.

No. [redacted] 91

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

RICHARD R. McGINNIS,
RICHARD WALLER,
D. BAILEY MERRILL,
Counsel for Respondent.

SUBJECT INDEX.

Table of Cases Cited.

Table of Statutes Cited.

Encyclopedia Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, Petitioner, vs. NELLIE B. WIGGINTON, Respondent.	No. 1242.

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit (R. 61-74) is reported in 126 F. (2d) 659.

II.

JURISDICTION.

1. The judgment of the Circuit Court of Appeals which the petitioner seeks to have reviewed was entered February 9, 1942 (R. 74).

2. A petition for rehearing was filed by the petitioner on February 20, 1942 (R. 75).

3. The petition for rehearing was not entertained by the Circuit Court of Appeals, but was ordered stricken from the files of that Court because of the impertinent and scandalous matter contained therein on April 13, 1942 (R. 75).

4. The petition for a writ of certiorari was filed with the clerk of this court on May 18, 1942, this being more than three months after the entry of the judgment of the Circuit Court of Appeals which the petitioner seeks to have reviewed by this Court.

5. The period for applying for a writ of certiorari in the case at bar was not extended by a Justice of this court.

6. The statutory provision which is believed to deny this Court jurisdiction to allow or entertain a writ of certiorari in the case at bar because the petition for a writ of certiorari was filed too late is Acts of Cong., Feb. 13, 1925, C. 229, Sec. 8 (a, b, d) (43 Stat. 940), 28 U. S. C. 350.

7. The cases believed to sustain the respondent's contention that a petition for rehearing which is not entertained by the Court, but which is ordered stricken from the files, does not extend the time for filing a petition for a writ of certiorari beyond the three months period following the entry of the judgment by the Circuit Court of Appeals are as follows:

National Labor Relations Board v. Mackay Radio & Telegraph Co., 304 U. S. 333, 343;
United States v. Seminole Nation, 299 U. S. 417, 421;
Citizens Bank of Michigan City v. Mary Opperman, 249 U. S. 448, 450;
United States v. Charles E. Ellicott, 223 U. S. 524, 539;
Kingman & Co. v. Western Manufacturing Co., 170 U. S. 675, 678;

Northern Pacific R. R. Co. v. James Holmes, 155 U. S. 137, 138;
Aspen Mining & Smelting Co. et al. v. Margaret Billings et al., 150 U. S. 31, 36;
Texas Pacific Railway Co. v. James Murphy, 111 U. S. 488, 489;
Brockett v. Brockett, 2 Howard 238, 241.

III.

STATEMENT OF THE CASE.

The respondent-plaintiff, Nellie B. Wigginton, brought this action against the petitioner-defendant, The Order of United Commercial Travelers, to receive a five thousand dollar ($5,000.00) death benefit due under a contract which insured her husband, Charles S. Wigginton, against death by accidental means (R. 1-5). The contract of insurance resulted from the membership of Charles S. Wigginton in The Order of United Commercial Travelers, and was evidenced by a certificate of membership (R. 4) and a certificate of insurance (R. 5).

The Order of United Commercial Travelers defended this action on the ground that subsequent to the time Charles S. Wigginton became a member of the Order and was issued the certificate of insurance, the Order amended its constitution to include the following language:

> "Nor shall the Order be liable for any death benefit when the member dies as the result of injuries sustained as a result of a gunshot wound or the alleged accidental discharge of firearms where there is no eyewitness except the member himself, in any amount greater than Five Hundred Dollars ($500.00)."

And that Charles S. Wigginton died as the result of injuries sustained as the result of a gunshot wound where there was no eyewitness except the member himself (R. 11-13).

Nellie B. Wigginton contended, first, that under the facts in the case at bar the requirements of the eyewitness clause had been met, and, second, that this eyewitness clause was invalid, (a) because it was an attempt to contract as to a rule of evidence and therefore contrary to public policy, and (b) because the Order did not have the power to adopt such an amendment to its constitution as this and affect the rights of members who held certificates of insurance prior to the date of the adoption of the amendment.

The facts as stipulated by the parties relevant to the death of Charles S. Wigginton are as follows (R. 26-27):

> "12. On November 4, 1939, the insured member, Charles S. Wigginton, received a gunshot wound as the result of the discharge of a firearm and as the result of said gunshot wound, and, independently of all other causes, died within a few seconds thereafter.
>
> "13. The insured member's office on November 4, 1939 was in room 906 on the ninth floor of the Citizens National Bank Building in the City of Evansville. About 12:15 o'clock on the afternoon of November 4, 1939, he took his shotgun and placed it on his desk in his office for the purpose of cleaning it. He also placed on his desk at the same time a can of oil, a cleaning rag, the cleaning rod and his pocket knife, and actually started to clean the gun. This was observed by Mildred McGowan, his secretary, who left the office about 12:15 p. m., and at the time she left the office he was cleaning the gun.
>
> "Reese Young was a coal dealer in the City of Evansville who purchased coal from Mr. Wigginton's company. Shortly before 12 o'clock noon, he had called Mr. Wigginton by telephone and made an appointment for about 1:30 p. m. to talk to him about the problem of a shortage of coal and his desire to get regular deliveries.
>
> "After Mr. Wigginton's secretary left the office, he

also left his office and was taken to the ground floor of the building in an elevator operated by Freda Chapel. This was about 12:45 p. m. He returned to the elevator about ten (10) minutes before his death and was taken to the ninth floor of this office building in an elevator operated by Ocie Lemon, with whom he had a conversation while on the elevator.

"Between 1:15 and 1:30 p. m., Reese Young stepped from the elevator on the ninth floor of this building, and immediately after stepping from the elevator, and before taking more than three (3) steps from it, he heard a sound resembling a gunshot. At this time he was in a position where he could see the length of the hallway to the door of Charles S. Wigginton's office, but he could not see into the office. He did not see any person in the hallway at that time. The door of Mr. Wigginton's office opened off of the side of the hallway and Reese Young could not see into his office until he reached the doorway. He walked without accelerating his speed from that point down the hallway, a distance of fifty-three (53) feet, taking him approximately twelve (12) seconds from the time he heard the gunshot to the office of Charles S. Wigginton, and saw that the door was open and saw the body of Charles S. Wigginton lying on the floor of the office, and saw the shotgun and cleaning articles lying on the desk with the barrel of the shotgun pointed toward the chair of Mr. Wigginton behind his desk. He did not see anyone else in the room at that time.

"In a few moments several other people came into the room. A physician, Dr. Herbert Dieckman, was immediately called, and it was found that Charles S. Wigginton had died from a gunshot wound to his left chest and heart and that death was practically instantaneous. One barrel of the shotgun which was lying on the desk had been discharged.

"14. Each of the parties is entitled to any and all of the inferences and presumptions of fact and law resulting from the foregoing to the same extent as if the evidence contained in this stipulation had been pre-

sented to the court by the oral testimony of witnesses."

The United States District Court for the Southern District of Indiana found for the plaintiff, Nellie B. Wigginton, and rendered judgment against the defendant, The Order of United Commercial Travelers, in the sum of five thousand two hundred sixty-two and 50/100 dollars ($5,262.50) (R. 28).

The case was appealed to the United States Circuit Court of Appeals for the Seventh Circuit and that Court affirmed the judgment of the District Court (R. 74). The judgment was affirmed on the ground that there was an eyewitness within the meaning of the amendment to the constitution of The Order of United Commercial Travelers (R. 61-73). Having decided that the requirements of the eyewitness clause had been satisfied, the Circuit Court of Appeals declined to pass upon the question as to the validity of the eyewitness clause and upon the subordinate question as to whether or not a federal court sitting in Indiana is bound by the Indiana Uniform Judicial Notice of Foreign Law Act in a case originating in a state court (R. 63).

After expressing its approval of the action of the District Court in holding there was an eyewitness in the case at bar, the Circuit Court of Appeals announced an alternate reason affirming the judgment of the District Court. The Court stated that the eyewitness clause under consideration in the case at bar is ambiguous in that it is not clear whether the clause requires an eyewitness to the dying or to the shooting. The Court held that it could be reasonably inferred that Reese Young was an eyewitness to the dying of Charles S. Wigginton, and that for this reason the requirements of the eyewitness clause had been met (R. 73-74).

IV.

ARGUMENT.

SUMMARY OF ARGUMENT.

Point A. The petitioner is not entitled to a writ of certiorari since the petition for a writ of certiorari was filed more than three (3) months after the entry of the judgment by the Circuit Court of Appeals.

1. The federal statutes require that an application to the Supreme Court of the United States for a writ of certiorari to a Circuit Court of Appeals be made within three (3) months after the entry of the judgment by the Circuit Court of Appeals.

2. A petition for rehearing filed in the Circuit Court of Appeals which is not entertained by the Court, but which is ordered stricken from the files of the Court, will not extend the time for application to the Supreme Court for a writ of certiorari beyond the three (3) months period following the entry of the judgment by the Circuit Court of Appeals.

Point B. The petitioner in its petition for a writ of certiorari has not stated sufficient reasons to warrant the issuance of a writ of certiorari by this Court to the Circuit Court of Appeals in the case at bar.

1. The petitioner holds that the Circuit Court of Appeals, in construing the eyewitness clause so as to allow a recovery for the plaintiff, has decided a question of Indiana law in a way probably contrary to the local law of Indiana, but the petitioner admits that there is no decided case in Indiana expressly construing the eyewitness clause (Pet. Br., p. 9), and this Court has held that in the absence of a case in point this Court will not disturb the interpretation of the local law of a state as announced by a Federal

District Court judge of that state and a Circuit Court of Appeals having jurisdiction of that state.

2. The interpretation given the eyewitness clause by the Circuit Court of Appeals in holding that under the facts of the case at bar the requirements of the eyewitness clause are satisfied is not illogical and therefore is not contrary to the general principles of law as stated by the courts of Indiana.

3. The decision of the Circuit Court of Appeals in holding that the eyewitness clause in the case at bar is ambiguous is not illogical and therefore is not contrary to the general principles of law as stated by the courts of Indiana.

Point C. The question as to whether or not a federal court sitting in Indiana would be bound by the Indiana Uniform Judicial Notice of Foreign Law Act in a case originating in a state court was not decided by the Circuit Court of Appeals. So long as the decision of the Circuit Court of Appeals to the effect that the eyewitness clause has been satisfied remains in force, the question as to the validity of the eyewitness clause and the subordinate question relative to the Indiana Uniform Judicial Notice of Foreign Law Act are moot questions and therefore should not be made the basis for a writ of certiorari.

POINT A.

The petitioner is not entitled to a writ of certiorari since the petition for a writ of certiorari was filed more than three (3) months after the entry of the judgment by the Circuit Court of Appeals. The judgment of the Circuit Court of Appeals for the Seventh Circuit, which the petitioner asks this Court to review, was entered on February 9, 1942 (R. 74). The petition for a writ of certiorari was filed on May 18, 1942, this being more than three (3)

months following the date of the entry of the judgment by the Circuit Court of Appeals.

The applicable federal statute provides:

> "No writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three (3) months after the entry of such judgment or decree, excepting that writs of certiorari to the Supreme Court of the Philippine Islands may be granted where application therefor is made within six (6) months. For good cause shown either of such periods for applying for a writ of certiorari may be extended not exceeding sixty (60) days by a Justice of the Supreme Court." Acts of Congress, February 13, 1925, c. 229, sec. 8 (a, b, d) (43 Stat. 940), 28 U. S. C. 350.

Since the petitioner did not comply with this statute, the petitioner is not entitled to a writ of certiorari.

The petitioner maintains, however, that since it filed its petition for rehearing within the time required by the Circuit Court of Appeals, which petition for rehearing was ordered stricken from the files by the Circuit Court of Appeals on April 13, 1942 (R. 75), the three (3) months period within which to file a petition for a writ of certiorari dates from April 13, 1942.

The petitioner is in error in supposing that the filing of its petition for rehearing in the Circuit Court of Appeals extended the time for filing a petition for a writ of certiorari in this court beyond the three (3) months period following the date of the entry of the judgment by the Circuit Court of Appeals. The rule as established by this Court with reference to the filing of a petition for rehearing provides that if a motion for new trial or petition for rehearing is seasonably filed and entertained by the Court, the time limited for a writ of error or certiorari does not

begin to run until the motion or petition has been disposed of by the court in which it is filed.

National Labor Relations Board v. Mackay Radio & Telegraph Co., 304 U. S. 333, 343;
United States v. Seminole Nation, 299 U. S. 417, 421;
Citizens' Bank of Michigan City v. Mary Opperman, 249 U. S. 448, 450;
United States v. Charles E. Ellicott, 223 U. S. 524, 539;
Kingman & Co. v. Western Manufacturing Co., 170 U. S. 675, 678;
Northern Pacific R. R. Co. v. James Holmes, 155 U. S. 137, 138;
Aspen Mining & Smelting Co. et al. v. Margaret Billings et al., 150 U. S. 31, 36;
Texas Pacific Railway Co. v. James Murphy, 111 U. S. 488, 489;
Brockett v. Brockett, 2 Howard 238, 241.

It is to be noted that in addition to the filing of a petition for rehearing, the Court must actually entertain the petition in order to extend the time for filing the application for a writ of certiorari. In the case at bar the record definitely shows that the Circuit Court of Appeals did not entertain the petition for rehearing filed by the petitioner, for it shows that the Circuit Court of Appeals ordered the petition for rehearing stricken from the files because of the scandalous and impertinent matters therein contained (R. 75). This is the most forceful manner in which the Circuit Court of Appeals could show that it had refused to entertain the petition for rehearing. Being thus unable to show that subsequent to the entry of the judgment of February 9, 1942, it filed a petition for rehearing that was entertained by the Court, the petitioner must be bound by the rule which requires that it file its petition for a writ of certiorari within three (3) months after the date of the entry of the judgment. Having failed to do this, the petitioner is not entitled to a writ of certiorari.

The petitioner argues that even a petition for rehearing that is stricken from the files because of the scandalous and impertinent matters contained therein must be held to extend the time for filing and application for a writ of certiorari. It would be possible, the petitioner argues, for the Circuit Court of Appeals to strike from the files a scandalous and impertinent petition for rehearing more than three (3) months after the judgment had been entered, thus depriving the petitioner of any right to apply for a writ of certiorari unless the time for application be computed from the date that the petition is ordered stricken from the files. The petitioner contends that regardless of the nature of the language contained in its petition for rehearing, the mere filing of the petition should extend the time for application for a writ of certiorari.

The respondent does not agree with this contention.

The effect of the action of the Circuit Court of Appeals in striking the petition for rehearing from the files was to declare that the instrument which the petitioner filed as a petition for rehearing was so offensive to the Court that it could not be accepted by the Court as a petition for rehearing, and so as a matter of record in the case at bar no petition for rehearing was actually filed. Corpus Juris, Vol. 49, p. 774, Pleading, Sec. 1126.

It is to be noted that the petitioner does not question the action of the Circuit Court of Appeals in holding that the petition for rehearing contained such scandalous and impertinent matter as to require its being stricken from the files without any consideration by the Court, and the respondent therefore assumes that the petitioner recognizes that the character of the petition for rehearing which it filed merited the exact treatment which the Circuit Court of Appeals gave it. If a party, in availing itself of the privilege of petitioning a court for a rehearing, chooses

to fill the petition with such scandalous and impertinent matter that the court in which it is filed is justified in not only refusing to consider the petition, but in actually striking it from the files, then the offending party cannot complain when it finds itself deprived of the advantages that would have accrued to it had it filed a proper petition for a rehearing. If the Circuit Court of Appeals were to act wrongfully in striking a petition for rehearing from the files, certainly this Court could grant relief from that action of the Circuit Court of Appeals and thus protect a litigant from the malicious or spiteful action of a prejudiced court. Where, however, the party admits the propriety of the action of the Circuit Court of Appeals in striking the petition for rehearing from the files, it must accept the results that follow from its failure to file a pleading which could qualify as a proper petition for a rehearing. The loss of any advantages that would have come from filing a petition for rehearing is certainly one of the punishments that is meted out by the Court in striking a petition from the files because of the scandalous and impertinent matter contained therein.

It should also be noted that the Circuit Court of Appeals ordered the petition for rehearing stricken from the files on April 13, 1942 (R. 75), and that the three (3) months period following the entry of the judgment by the Circuit Court of Appeals on February 9, 1942 (R. 74), did not expire until May 9, 1942. This gave the petitioner an ample period of time within which either to file its petition for a writ of certiorari or to apply to a judge of this court for an extension of the time within which to file a petition for a writ of certiorari as provided by statute. The petitioner did neither.

Upon the state of the record it is earnestly submitted by the respondent that the petitioner is not entitled to a writ of certiorari because its application for a writ of certiorari has been filed too late.

POINT B.

The petitioner in its petition for a writ of certiorari has not stated sufficient reasons to warrant the issuance of a writ of certiorari by this Court to the Circuit Court of Appeals.

The principal reason advanced by the petitioner for the granting of the writ is that the Circuit Court of Appeals, in construing the eyewitness clause so as to permit the respondent to recover under the facts in this case, has decided a question of Indiana law in a way probably contrary to the local law of Indiana. The petitioner admits that there is no decided case in Indiana which establishes the law of Indiana on the question of the construction of the eyewitness clause (Pet. Br. p. 9). The petitioner merely cites cases which state some very general principles of Indiana law and argues that the decision of the Circuit Court of Appeals in the present case violates these general principles of Indiana law.

This Court, in the case of Alexander MacGregor v. State Mutual Life Assurance Company of Worcester, Massachusetts, Adv. Ops. October Term, 1941, No. 179, 86 L. Ed. 559, stated the rule that where a federal district judge sitting in a particular state and a Circuit Court of Appeals having jurisdiction of that state pass upon a question of purely local law of that state, and there is no decision by a court of that state on the question, then the Supreme Court will not disturb the ruling of the federal judges. In that case the Court stated:

> "No decision of the Supreme Court of Michigan, or of any other court of that state, construing the relevant Michigan law, has been brought to our attention. In the absence of such guidance, we shall leave undisturbed the interpretation placed upon purely local law by a Michigan federal judge of long experience and by three circuit judges whose circuit includes Michigan."

In the case at bar the judgment of the District Court was rendered by the Honorable Robert C. Baltzell, who for many years has been a federal district judge of the State of Indiana and who previous to his appointment was a judge in an Indiana Circuit Court. The opinion of the Circuit Court of Appeals for the Seventh Circuit was written by the Honorable Sherman Minton, who, before his appointment as a judge in the Circuit Court of Appeals for the Seventh Circuit, was an Indiana lawyer. It is expressly submitted that the present case falls within the rule set out in the case of MacGregor v. State Mutual Life Assurance Company, Adv. Ops. October Term, 1941, No. 179, 86 L. Ed. 559, in which this Court refused to disturb the opinion of the Michigan federal judges when there was no case decided by a Michigan state court on the question involved.

Despite the fact that this Court has previously indicated that it will not disturb the decision of federal judges of a given state with regard to the local law of that state when there is no decision of a court of that state on the question, still respondent wishes to point out that the decision of the Circuit Court of Appeals in construing the eyewitness clause so as to allow recovery for the plaintiff under the facts of this case is not contrary to the general law of the State of Indiana.

The gist of the petitioner's argument on this point seems to be that the action of the Circuit Court of Appeals in construing the eyewitness clause in favor of the plaintiff was illogical and that, since the law of Indiana is logical, the decision of the Circuit Court of Appeals is in conflict with the Indiana law. The respondent has never been able to follow the petitioner along this line of reasoning. It seems quite simple, however, to show that the construction placed upon this eyewitness clause by the Circuit Court of Appeals is entirely consistent with the gen-

eral rules of Indiana law. The leading Indiana case dealing with the construction of a contract of insurance is that of Masonic Accident Insurance Company v. Jackson, 200 Ind. 472, 482, 164 N. E. 628, 631. The Supreme Court of Indiana in that case laid down the following rule to guide courts in construing contracts of insurance:

> "An insurance policy should be so construed as to effectuate indemnification to the insured or his dependent beneficiary against loss, rather than to defeat it.
>
> "Where any reasonable construction can be placed on a policy that will prevent the defeat of the insured's indemnification for a loss covered by general language, that construction will be given.
>
> "It is the duty of the court to give such construction to an accident policy, if the language fairly admits, as will make it of some substantial value and carry out the intention expressed therein, that liability is incurred where death occurs from accidental injury."

Thus we see that it is the policy of the law of Indiana to interpret a contract of insurance so as to allow recovery by the beneficiary of the insurance if this can be done by placing any reasonable construction upon the language of the policy.

The respondent submits that the general law on the subject of eyewitness clauses, including the cases quoted in the opinion of the Circuit Court of Appeals (R. 64-73), clearly supports the decision that the stipulated facts showed an eyewitness.

The opinion of the Circuit Court of Appeals (R. 61-73) carefully discusses the cases of Lewis v. Brotherhood Accident Co., 194 Mass. 1, 79 N. E. 802; Pride v. Interstate Business Men's Accident Association, 207 Iowa 167, 216 N. W. 62; Ellis v. Interstate Business Men's Accident As-

sociation, 183 Iowa 1279, 168 N. W. 212, and Order of United Commercial Travelers of America v. Knorr, 112 Fed. (2d) 679, showing that the general law on the subject of the eyewitness clause requires a decision that there was an eyewitness in the case at bar. The respondent cannot improve upon this able discussion of the general law on the subject. The respondent wishes to point out, however, that the petitioner itself accepts the case of Lewis v. Brotherhood Accident Co., 194 Mass. 1, 79 N. E. 802, as correctly interpreting the eyewitness clause and as being the leading case on the subject (Pet. Br., p. 36).

After first determining that the facts in the case at bar satisfied the eyewitness clause under the theory of the law as first set out in the case of Lewis v. Brotherhood Accident Co., 194 Mass. 1, 79 N. E. 802, the Circuit Court of Appeals proceeded to point out an alternate reason as to why the eyewitness clause was satisfied. As stated in the opinion of the Circuit Court of Appeals (R. 73-74):

> "Furthermore, we think the provision of the constitution of the appellant order under consideration in this case is ambiguous. It provides that there must be an eyewitness. Witness to what? The dying or the shooting? Surely it cannot be said that this provision is clear as to which one is meant. We are unable to determine from a reading of the provision which one is meant. Contracts of insurance are construed most strongly against the insurance company and so as to give protection to the insured if this can be reasonably done. Masonic Insurance Co. v. Jackson, 200 Ind. 472, 164 N. E. 628. In the case at bar there was an eyewitness to the death of the insured. Mr. Young was upon the scene within twelve seconds. It is a fair inference which we are authorized in this case to draw, that Young saw Wigginton dying. It is reasonable to construe the policy which is ambiguous, so as to mean that there shall be an eyewitness to the 'dying.' We so construe it. Young was the eyewitness to the dying. Therefore, the requirements of the policy were met."

The petitioner maintains that in holding the eyewitness clause to be ambiguous, the Circuit Court of Appeals has violated a general rule of Indiana law which requires that language be given its popular and usual significance.

The respondent submits that if the eyewitness clause in question is carefully read with a view toward determining the proper grammatical construction which should be placed upon the clause, it is impossible to say whether the words "where there is no eyewitness" do refer to the dying or to the shooting. The petitioner does not question this point. The petitioner merely indulges in a long discussion concerning the general mental attitude of average men and asks this Court to conclude from its knowledge of the general attitude of ordinary men that they could not have meant there must be an eyewitness to the death of a person because the thought of requiring an eyewitness to the death of any person is so abhorrent to the average man. We submit that no such analysis of human nature can be brought into this case so as to make clear and certain a clause that is grammatically ambiguous.

The petitioner also argues that the ambiguity is eliminated by the use of the words "except the member himself." The petitioner contends that it would be ridiculous to think of the member himself as being an eyewitness to his own death. The respondent submits that it is just as reasonable to consider a person as a possible eyewitness to his own death as to consider him as a possible eyewitness to the accident which immediately caused his death. The words "except the member himself" are not sufficient to eliminate the ambiguity resulting from the grammatical construction of this eyewitness clause.

The petitioner then insists that the Circuit Court of Appeals should not have found such an ambiguity to exist simply because no other court in the thirty-five (35) years that eyewitness clauses have been under investigation has found such ambiguity to exist. This is a fallacious argument, since the mere fact that a question has not been

raised before is not conclusive as to the fact that no such question exists. However, when the eyewitness clauses of other insurance contracts which have come before the courts are considered, it is easy to understand how the Circuit Court of Appeals in the case at bar considered the present eyewitness clause ambiguous, whereas other courts in passing upon other eyewitness clauses have not found any ambiguity to exist. The eyewitness clause in the case at bar provides:

> "Nor shall the Order be liable for any death benefit when the member dies as the result of injuries sustained as a result of a gunshot wound or the alleged accidental discharge of firearms where there is no eyewitness except the member himself, in an amount greater than Five Hundred Dollars ($500.00)" (R. 24-25).

Other eyewitness clauses read as follows:

> "The Society shall not be liable for the payment of double indemnity under any beneficiary certificate providing for double indemnity in case of the death of the member by accident, where it is claimed that death resulted from accidental drowning, cutting, poisoning, hanging, inhalation of gas, discharge of firearms or shooting, unless at least one person other than the member was an eyewitness of such drowning, cutting, poisoning, hanging, inhalation of gas, discharge of firearms or shooting."
>
> Affidavit of Secretary of Woodmen of the World Life Insurance Society, Petition for Certiorari, p. 30.

> "H. The Association shall not be liable for death, disability or specific loss in excess of one-tenth of the amounts of these by-laws provided for indemnity for death, disability or specific loss when said death, disability or specific loss arises from or is effected or aggravated by any of the following causes, conditions or acts or results therefrom, to wit: * * * death or injuries resulting from the discharge of firearms where the member (or beneficiary in case of death of the mem-

ber) is unable to prove by actual eyewitnesses other than himself or the claimant, the nature and circumstances of the discharge of the firearms and the infliction of the injury."

Affidavit of Secretary-Treasurer of Iowa State Traveling Men's Association, Petition for Certiorari, p. 28.

"* * * if the loss be sustained as the result of the discharge of a firearm unless the claimant shall establish the accidental cause of the discharge by the testimony of a person other than the insured or the claimant who saw the cause in operation at the time of the discharge."

Pride v. Interstate Business Men's Accident Association, 207 Iowa 167, 216 N. W. 62.

"The association shall not be liable * * * for injuries or the results therefrom under any of the following circumstances, to-wit: injuries resulting from the discharge of firearms where there is no eyewitness to the discharge except the member himself."

Fiedler v. Iowa State Traveling Men's Association, 179 N. W. 317.

"This association shall not be liable for the payment of benefits or indemnity on account of disability or death resulting from a bodily injury caused by the discharge of firearms, unless the member or person claiming by, through or under any certificate issued to such member shall establish the accidental character of such discharge by the testimony of at least one person, other than the member, who was an eyewitness of the event."

Ellis v. Interstate Business Men's Accident Association, 183 Iowa 1279, 168 N. W. 212;

Roeh v. Business Men's Protective Association, 164 Iowa 199, 145 N. W. 479, 480.

"The association shall not be liable for the payment of double indemnity when any beneficiary certificate providing for double indemnity in case of the death of the member by accident, where it is claimed that

death resulted from accidental drowning, cutting, poisoning, hanging, inhalation of gas, discharge of firearms or shooting, unless the fact that such drowning, cutting, poisoning, hanging, inhalation of gas, discharge of firearms or shooting, was accidental shall be established by the testimony of at least one person other than the member, who was an eyewitness to such drowning, cutting, poisoning, hanging, inhalation of gas, discharge of firearms or shooting."

Villemarette v. Sovereign Camp, W. O. W. (La. App.), 178 So. 648, 649.

"In the event of any accidental bodily injury, fatal or non-fatal, contributed to or caused by * * * drowning or shooting when the facts and circumstances of the accident and injury are not established by the testimony of an actual eyewitness * * *."

Lewis v. Brotherhood Accident Co., 194 Mass. 1, 79 N. E. 802, 804.

"If the insured receives bodily injuries, fatal or otherwise, by the discharge of firearms * * * the claimant shall establish the accidental character of the injury by the testimony of at least one eyewitness to the accident other than the insured himself."

Bankers Health & Accident Association v. Wilkes (Tex. Civ. App.), 209 S. W. 230, 233.

"Unless the claimant shall establish the accidental character of the injury by the testimony of a person other than the member or the claimant who was an eyewitness to all of the circumstances of the casualty."

Lundberg v. Interstate Business Men's Accident Association (Wis.), 156 N. W. 482.

The respondent submits that the ambiguity which actually exists in the language of the eyewitness clause in the case at bar was expressly eliminated by the careful language of the eyewitness clauses used in other cases. The

petitioner should not be permitted to avail itself of the careful language of other insurance contracts to remove an obvious ambiguity from its own contract of insurance.

POINT C.

As a final reason for requesting that this court issue a writ of certiorari in the case at bar, the petitioner points out that it would be possible for this court, if it were to review the opinion of the Circuit Court of Appeals, to settle the question as to whether or not under the rule of Erie Railroad Company v. Tompkins, 304 U. S. 64, a federal court sitting in Indiana is bound by the Indiana Uniform Judicial Notice of Foreign Law Act, Acts Indiana General Assembly, 1937, ch. 124, secs. 1 to 7, p. 703; Burns' Indiana Statutes Annotated 1933 (Cum. Pocket Supp., Dec., 1941) 2-4801 to 2-4807, in a case originating in a state court. (Petition for Certiorari 24) (Pet. Br. p. 49.) This question is subordinate to the general question as to the validity of the eyewitness clause in the present case (Pet. Br. pp. 49-52).

The Circuit Court of Appeals declined to pass upon the validity of the eyewitness clause (R. 63), using this language:

> "We lay to one side the question of the validity of the amendment to the constitution and proceed to a determination of whether under the undisputed facts in this case there was an eyewitness within the meaning of the amendment,"

and consequently did not pass upon the question as to whether or not a federal court sitting in Indiana is bound by the Indiana Uniform Judicial Notice of Foreign Law Act in a case originating in a state court (Petition for Certiorari 16). So long as the decision of the Circuit Court of Appeals to the effect that there was an eyewitness

stands, the question as to the Indiana Uniform Judicial Notice of Foreign Law Act remains a moot question in this case.

Notwithstanding this fact, the petitioner urges this Court to review the case at bar so that it may decide this question of law for the benefit of the bench and bar in the future. The petitioner urges that this should be done in the case at bar for the benefit of impecunious litigants and timid attorneys who may in the future wish for a decision on the point (Petition for Certiorari 16-17, 25). It is earnestly submitted by the respondent that, regardless of the willingness of the petitioner to assume the expense and burden of presenting the case to this Court for the benefit of the bench and bar in the future, this respondent, who is now the widow of Charles S. Wigginton, is not in a position to assume the expense and burden of presenting her side of this case to this Court merely for the purpose of aiding litigants and lawyers in the future. Certainly no litigant should be required to assume the burden of presenting a question to this Court when that question is not vital to the decision of the case, simply because it would give this Court an opportunity to settle an otherwise undecided point of law. The obvious injustice that would result to the respondent in this particular case makes this argument of the petitioner ridiculous.

For the reasons above stated, the respondent respectfully submits that this petition for a writ of certiorari from this Court to the Circuit Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

RICHARD R. McGINNIS,
RICHARD WALLER,
D. BAILEY MERRILL,
Counsel for Respondent.